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No._____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1983

William R. McCann,
Petitioner,

v.

State of Georgia,
Respondent.

On Appeal From The Georgia Court Of Appeals

PETITION FOR CERTIORARI - CRIMINAL CASE

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QUESTIONS PRESENTED

Did the use of the presumptions of fact based on Official Code of Ga. Ann. §40-6-392 in the jury charge at Petitioner's trial shift the burden of proof to Petitioner to prove his innocence and deny Petitioner due process of law?

Could Petitioner's due process challenge somehow be barred from consideration by the Georgia Appellate Courts or by this Court by a procedural "gimmick" invented by the Georgia Court of Appeals?

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1983

No. _____

WILLIAM R. McCANN,
Petitioner

VS.

STATE OF GEORGIA,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF UNITED STATES

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

William R. McCann, the Petitioner herein, prays that a writ of certiorari issue to review the judgment of the Georgia Court of Appeals entered in the above entitled case on June 21, 1983.

QUESTIONS PRESENTED

Did the use of the presumptions of fact based on Official Code of Ga. Ann. §40-6-392 in the jury charge at Petitioner's trial shift the burden of proof to Petitioner to prove his innocence and deny Petitioner due process of law?

Could Petitioner's due process challenge somehow be barred from consideration by the Georgia Appellate Courts or by this Court by a procedural "gimmick" invented by the Georgia Court of Appeals?

OPINIONS BELOW

The decree of the Georgia Supreme Court denying certiorari is unreported, and is set out in Appendix, p. A-7. The decision of the Georgia Court of Appeals

is also presently unreported, and is set out in Appendix, p. A-2,3. The Journal of Entry of Judgment of the State Court of Clarke County, Georgia, is set out in Appendix hereto, infra, page A-8.

JURISDICTION

The judgment of the Georgia Court of Appeals affirming Petitioner's conviction was entered on June 21, 1983 (Appendix, page A-3). A timely petition for rehearing was denied on July 8, 1983 (Appendix, page A-7).

On September 6, 1983, the Georgia Supreme Court denied Petitioner's petition for certiorari (Appendix, page A-7).

The jurisdiction of the Supreme Court of the United States is invoked under 28 U.S.C. §1257(3).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

This case involves Georgia's statutory presumption of intoxication for driving under the influence of alcohol cases, Official Code of Ga. Ann. §40-6-392 (Michie, 1982), formerly Ga. Code Ann. §68A-902.1 (Harrison, 1974), and the Fourteenth Amendment of the United States Constitution, U.S. Const. Amend. 14. The test of these provisions is set forth in the Appendix.

STATEMENT OF THE CASE

A. Course of Proceedings In the Case Now Before This Court

On September 23, 1980, in a case then pending in the State Court of Clarke County, Georgia, entitled State of Georgia v. William R. McCann, Case No.

23999, Petitioner was found guilty by a jury on an accusation charging him with driving under the influence of alcohol, Official Code of Ga. Ann. §40-6-391 (Michie 1982), formerly Ga. Code Ann. §68A-902 (Harrison 1974), and speeding (Official Code of Ga. Ann. §40-6-181 (Michie 1982), formerly Ga. Code Ann. §68A-802 (Harrison 1975) (R.2,3),

The Petitioner was duly sentenced on December 11, 1980 and was given twelve months' probation and a $250.00 fine (Appendix, p. A-8).

On December 11, 1980 a motion for new trial was duly filed; and on September 1, 1982, an order was entered overruling the same (Appendix, p. A-9).

Petitioner appealed his driving under the influence conviction to the Georgia Court of Appeals, Case No. 65357, and on December 22, 1982, the Court of

Appeals sent this appeal directly to the Georgia Supreme Court for review since Petitioner's claim of error involved a constitutional challenge to a State statute; that being that the jury charge at his trial shifted the burden of proof to Petitioner, violating his due process rights under the Fourteenth Amendment of the United States Constitution, Appendix, page A-1,2.

On February 4, 1983 the Georgia Supreme Court sent this case back down to the Georgia Court of Appeals stating that since this challenge involved the application of the Georgia and Federal constitutions to a State statute, the Court of Appeals had jurisdiction to review the case, Appendix p. A-2,3.

On June 21, 1983 the Georgia Court of Appeals affirmed Petitioner's conviction, now case no. 66203, Appendix, p.A-3-6.

Petitioner timely filed a motion for rehearing on June 24, 1983 and same was denied. Appendix, p. A-7.

Petitioner then applied for a writ of certiorari to the Georgia Supreme Court, case no. 40203, again alleging the federal constitutional due process question, and same was denied on September 6, 1983. Appendix, p. A-7.

B. Relevant Facts Concerning the Underlying Conviction for Driving Under the Influence of Alcohol.

The only facts from the record necessary for this Court's consideration on the underlying conviction are: (1) that the State proferred evidence of a

.11 grams/cc blood-alcohol level of Petitioner shortly after his arrest; (2) that the arresting officer and Petitioner's wife testified at trial that Petitioner appeared "normal" at the time of his arrest and thereafter. Appendix, p. A-5,6.

REASONS FOR GRANTING THE WRIT

I. THE PETITIONER WAS DENIED DUE PROCESS OF LAW UNDER THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION, SINCE THE BURDEN OF PROOF WAS SHIFTED TO THE PETITIONER TO PROVE HIS INNOCENCE AND THE STATE WAS, THEREFORE, RELIEVED OF ITS BURDEN TO PROVE EVERY ELEMENT OF THE OFFENSE CHARGED BEYOND A REASONABLE DOUBT.

A. Because of the Vague Language Used in Section 40-6-391 (formerly §68A-902), the Georgia Legislature Enacted a Statutory Presumption of Guilt, Which On Its Face, Wrongfully

Shifts the Burden of Proof to the Defendant.

In Georgia there are two elements of the offense of driving under the influence of alcohol: (1) driving a motor vehicle, and (2) being under the influence of alcohol while doing so. Official Code of Ga. Ann. §40-6-391 (Michie 1982), formerly Ga. Code Ann. §68A-902 (Harrison 1974). In the case at bar, there is no dispute as to whether the Petitioner was driving his automobile at the time of his arrest. Therefore, the only issue before the trial court on the D.U.I. charge was whether the Petitioner was intoxicated at the time of his arrest.

The Georgia courts have determined a person to be under the influence of alcohol: "when it appears that it is less safe for such person to operate a

motor vehicle than it would be if he were not so affected." Cargile v. State, 244 Ga. 871, 262 S.E.2d 87 (1979). Such a definition is as exacting as it is vague since the language connotes a qualitative notion, which is very difficult to quantify. Two individuals may well be within the qualitative boundaries of such definition (intoxicated), yet because of minute differences in quantity (blood-alcohol levels), one may be convicted while the other is acquitted. The difference in verdicts resting on jury charges based on a quantitatively based statutory presumption.

The problem presented here, of course, is making accurate determinations of such intoxication (as defined above in Cargile v. State), without making extensive tests in an individual's

ability to drive safely (i.e., pupil response test, reflex tests, hazard recognition tests, etc.).

In 1967, an attempt to demonstrate a consistent correlation between actual "intoxication" and blood-alcohol content was made by the National Safety Council. Committee on Alcohol and Drugs, National Safety Council, A Model Program for the Control of Alcohol for Traffic Safety, National Safety Council, Chicago, (1967). This paper provided the "basis for action" demanded by the federal government in 1966.

The federal government, through the National Highway Safety Traffic Administration of the Department of Transportation, required states to either enact laws (either per se levels of intoxication or statutory presumptions) declaring "that reaching or exceeding

0.10 per cent blood-alcohol concentration renders a person intoxicated or under the influence of alcohol", or run the risk of losing federal funds. Insurance Institute for Highway Safety, Status Report, Washington, D.C.., Vol. 9, 1974, No. 19, p. 1; No. 21, p. 1; No. 22, p. 11. Rather than being guided by normal criminal justice considerations or conventional scientific principles, the several states and territories have enacted almost uniform blood-alcohol regulations or presumtpions based on this federal standard (see, e.g., Ill. Rev. Stat. ch. 95 1/2, §11-501(c)(3) (1970)). The basis for this uniformity in the State laws was not then because of any compelling scientific evidence, but rather economic pressure by the Department of Transportation.

Rather than running the risk of losing federal funds, the Georgia legislature has enacted several statutory presumptions of law, which make uniform what in reality is not of a uniform nature as between individuals.[1]

Section 40-6-392, formerly §68A-902.1, states that when the blood-alcohol content of an individual is: (1) below 0.05% by weight, there is a presumption that such individual is not intoxicated; (2) between 0.05% and 0.10% by weight, there is no presumption; and (3) greater than 0.10% by weight, it shall be presumed that the person was under the

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[1] See Mason and Dubowski, Breath Alcohol Analysis: Uses, Methods, and Some Forensic Problems--Review and Opinion, 12 J. Forens. Sci. 9 (1976), where substantial research indicates that individual responses (intoxication) to the sme blood alcohol levels varies greatly.

influence of alcohol. Official Code of Ga. Ann. §40-6-392 (Michie 1982), Ga. Code Ann. §68A-902.1 (Harrison 1974).

A 19-year-old driver who has never had the taste of an alcoholic beverage on his lips may be stoned drunk on a couple of drinks and completely unable to drive safely, while an experienced drinker (of the same weight as the 19-year-old) may consume a slightly larger amount of alcohol in the same amount of time, and may in reality not have significantly impaired his ability to drive safely. Imagine that the 19-year-old has a 0.09% blood-alcohol content. Under Section 392, there would be no presumption of his intoxication that he must rebut or be convicted; yet he is stone drunk. Then imagine that the experienced drinker has a blood-alcohol content of .10%. He must rebut a statutory presumption of

intoxication or be convicted, yet he is, if not completely sober, at least much more sober than the drunken 19-year-old. How can this very possible and probably very common situation be justified in terms of due process of law and fundamental fairness?

B. Rebuttable Presumptions Cannot Be Construed as Permissive Inferences Since They Are By Definition Burden-Shifting And Therefore Violative of Due Process.

In 1970 this Court constitutionalized the then federal standard for proof of guilt in a criminal case; that being it is always incumbent upon the State to prove each and every element of the offense charged beyond a reasonable doubt. In Re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). When the State is relieved of this burden, the

defendant in that action has been denied due process of law under the 14th Amendment of the United States Constitution. Id.

Evidentiary devices such as permissive presumptions and inferences of fact have been used in the federal and state court systems for quite some time. County Court of Ulster County, New York v. Allen, 442 U.S. 140, 156, 99 S.Ct. 2213, 2224, 60 L.Ed.2d 777, 791 (1979). Their use has been justified on the ground that they merely serve to assist the trier of fact, and do not undermine their responsibility in the determination of the factual issues. Id. That is, the permissive charges instruct jurors that they may make the inferences which they would likely make from common knowledge and experience. Id. Of course, one might

wonder why such "assistance" is necessary at all, other than to "rig the game" against the defendant.

In 1979 this Court decided two landmark cases in this area: County Court of Ulster County, New York v. Allen, 442 U.S. 140, 99 S.Ct. 2213, 60 L.Ed.2d 777 (1979), and Sandstrom v. Montana, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979).

In Sandstrom, this Court reversed a murder conviction on the ground that the jury charge reciting a Montana statute which presumed a person to have intended the natural and probable consequences of his acts, violated the due process rights of the defendant by shifting the burden to him on the element of intent. Here, this Court defined two types of "mandatory" presumptions, both of which violated due process.

The first was a "conclusive presumption" which was defined as directing the jury to find an element of the offense upon proof of a fact regarding that element. Thus, in the Sandstrom context, proof that the defendant killed the victim would leave the jury with no choice but to conclude that he did so intentionally.

The second was the "burden-shifting" (or rebuttable) presumption which was defined as directing the jury to presume an element of the offense upon proof of a fact regarding that element, unless the defendant could prove himself not guilty on that element by superior evidence (by rebutting the presumption). This in the Sandstrom context would mean that if the jury found the defendant to have killed the victim, they should presume or

conclude that he intended to do so unless he could prove otherwise by superior (rebuttal) evidence.

Based on this analysis, this Court in Sandstrom found that since a reasonable juror could have interpreted the charge as either conclusive or burden-shifting, the defendant had been denied due process. 442 at 517, 99 S.Ct. at 2455, 61 L.Ed. 2d at 46.

In Ulster County, this Court held that a jury charge based on a New York statute regarding constructive possession of a firearm in an automobile, was merely a "permissive inference" or "permissive presumption," and did not violate the defendant's due process rights.

The challenged New York statute stated that the presence of a firearm in an automobile was "presumptive evidence" of its possession by the occupants of

that automobile, unless the firearm was found on the person of one of the occupants (or for several other enumerated exceptions).

The jury charge based on this statute instructed the jury that they may infer such constructive possession upon a satisfactory showing of occupancy by the defendants and the existence of the firearm in the car. The trial court made it very clear, however, that this inference was permissible rather than mandatory, and could be ignored by the jury even if the defendants offered no rebuttal evidence. "In short, the instructions plainly directed the jury to consider all the circumstances tending to support or contradict the inference." 442 U.S. at 162, 99 S.Ct. 2227, 60 L.Ed. 2d at 795.

Since Ulster County and Sandstrom were decided, hundreds of State and Federal cases have attempted to apply their holdings. A clear dichotomy of these type cases have been developed. One set or series of cases are based on jury charges that take the shape of "inferences." Usually in these type cases, the jury charges use phrases such as: "You may infer," "You are permitted to infer," "you may infer _____ and consider this inference as evidence," or "you may infer and consider this inference with other evidence", "you may infer but are not bound to consider this inference."

The other set or series of cases are based on jury charges that take the form of presumptions (either conclusive or rebuttable). Conclusive presumptions are usually given in a clearly directive

manner: "If you find X, then you should presume Y"; or, "the law presumes Y, if to your satisfaction, you should find X."

Rebuttable presumptions are usually not all that different from conclusive presumption, the only real difference being that the way in which the presumptions are given to the jury is slightly less directive in form. Thus, in a rebuttable presumption, the jury is given a conclusive presumption, and then told the presumption is rebuttable by superior evidence shown by the defendant (or that in some cases that the presumptions completely disappear in the face of superior evidence presented by the defendant which contradicts the presumption). Thus, a rebuttable presumption will take a form such as: "if you find X, then you shall presume Y, but this presumption may be rebutted by the

defendant"; or, "if you find X, then you shall presume Y (or Y shall be presumed), unless the defendant shows evidence rebutting Y, in which case if such evidence is superior to the presumption, it shall disappear."

Georgia, like the other states in the Union, has over the last several years developed an "inference-presumption" dichotomy in its case law on jury instructions. Unlike many other states, however, Georgia courts have developed these series of decisions based on a gross misunderstanding of what a "rebuttable presumption" is, and why these rebuttable presumptions have been found to be burden-shifting and violative of due process.

In Williamson v. State, the Georgia Supreme Court found a jury charge on recent possession of stolen property to

only constitute a "permissive presumption," and not a "mandatory presumption," which under Sandstrom v. Montana, supra, would have been violative of due process. 248 Ga. 47, 281 S.E.2d 512 (1981). Although in light of Sandstrom and Ulster County, it is arguable as to whether the charge actually was of a permissive or burden-shifting nature, in commenting on this charge, the Georgia Supreme Court clearly demonstrated its misunderstanding of what a burden-shifting presumption was, and that such burden-shifting presumptions are prohibited by Sandstrom.

The Georgia Supreme Court in Williamson also held that this jury charge on recent possession of stolen property was not burden-shifting, since if the defendant made a satisfactory explanation of his possession, the

presumption of his stealing the property disappeared. 248 Ga. at 59, 281 S.E.2d at 521.

In another case, the Georgia Supreme Court held that a "cautionary measure" such as instructing the jury that the presumption charged could be rebutted could somehow have made the rebuttable presumption not to be burden shifting. Hosch v. State, 246 Ga. 417, 420, 271 S.E.2d 817, 819, 820 (1980).

In both of these cases, the Georgia Supreme Court interpreted the term "rebuttable presumption" to necessarily mean the same thing as a "conclusive presumption," and found that Sandstrom only prohibited conclusive presumptions, since they believed that only conclusive presumptions were "mandatory."

This, of course, is not the import of Sandstrom, as this Court well knows. Sandstrom clearly defines conclusive and rebuttable presumptions as two separate and distinct notions, both being "mandatory" in nature, and both violative of due process. 442 U.S. at 517, 99 S.Ct. at 2456, 61 L.Ed. 2d at 46-47.

Rebuttable presumptions are by definition "burden-shifting," even though they are not "conclusive presumptions" which have been found by this Court to be tantamount to a directed verdict of guilt on a particular element of an offense. Connecticut v. Johnson, _____ U.S. _____, 103 S.Ct. 969, 976, 74 L.Ed 2d 823, 832 (1983). Any language in a charge such as "all presumptions are rebuttable" would not ameliorate or

neutralize the burden-shifting effect of the charge, but would only serve to enhance such burden-shifting effect.

Based on the type of reasoning shown in Williamson and Hosch, the Georgia Supreme Court has failed to find clearly burden-shifting charges to be violative of due process. They simply fail to understand that burden-shifting presumptions are mandatory, and are expressly prohibited by this Court's decisions in cases such as Sandstrom v. Montana and Connecticut v. Johnson.

C. Since At Petitioner's Trial The Jury Was Charged on Rebuttable Presumptions Based On Section 392, The Burden of Proof Was Shifted to Petitioner, and He Was Thereby Denied Due Process of Law.

At Petitioner's trial, the judge charged the jury on Section 392 as follows:

> Now, upon the trial of any criminal proceeding arising out of acts alleged to have been committed by any person while driving or in actual physical control of a moving vehicle while under the influence of alcohol, the amount of alcohol in the person's blood at the time alleged as shown by chemical analysis of such person's blood, urine, breath, or other bodily substance shall give rise to certain inferences or presumptions.
>
> Now, relative to presumptions, I charge you that all legal presumptions are rebuttable. There has been much erroneous thinking and more loose language in regard to presumptions. We read of presumptions of law, presumptions of fact, conclusive presumptions, disputable presumptions, but in truth, there is but one type of presumption in the strict legal meaning of the word and that is merely a general rule of law that under some circumstances in the absence of any evidence to the contrary, a jury is compelled

to reach a certain conclusion or fact. But a presumption so declared by the law is only raised by the absence of any real evidence as to the existence of the ultimate fact in question. It is not in and of itself evidence, but merely an arbitrary rule imposed by law to be applied in the absence of evidence and whenever evidence contradicting the presumption is offered, the latter disappears entirely and the triers of the fact are bound to follow the usual rules of evidence in reaching their ultimate conclusions of fact. However, in mentioning the fact that whenever evidence contradicting the presumption is offered, this does not alter the rule of law that there is no burden whatsoever on a Defendant to offer any testimony or any evidence whatsoever in support of his innocence. The burden is entirely on the State as I have previously charged you, to prove the guilt of the Defendant beyond a reasonable doubt.

These, then, are the presumptions of law which are raised and which may be considered by you in your deliberations. First, if there was at the time of making the test, breath test, blood test,

> urine test, or other bodily substance, there was at that time 0.05 percent or less by weight of alcohol in the person's blood, it shall be presumed that the person was not under the influence of alcohol. If there was at that time in excess of 0.05 percent but less than 0.10 percent by weight of alcohol in the person's blood, such fact shall not give rise to any presumption that the person was or was not under the influence of alcohol, but such fact may be considered with other competent evidence in determining whether the person was under the influence of alcohol. Third, if there was at that time 0.10 percent or more by weight of alcohol in the person's blood, it shall be presumed that the person was under the influence of alcohol.

Appendix, p. A-13-17.

In Petitioner's appeal to the Georgia Court of Appeals, that court found that this jury charge merely constituted a "permissive presumption" under County Court of Ulster County, N.Y. v. Allen, supra. McCann v. State, Case

No. 66,203, (Ga. App. June 21, 1983), cert. denied, 40203 (Ga. September 6, 1983). Appendix, p. 3-6. The rationale for this holding was as follows:

> In this case, appellant offered evidence through the arresting officer, his wife, and himself that he had consumed a minimal amount of beer over a sustained period, exercised vigorously while playing golf, eaten a meal, and both his wife and the officer indicated that he appeared "normal." Thus in accordance with the charge of the court, the "presumption" raised by the .11 reading "disappeared" in the face of the contradictory evidence, and the jury was required to determine the issue of driving while intoxicated based on the "usual rules of evidence".

Id.

This process of the defendant coming forward with evidence sufficiently contrary to the presumption to "burst the bubble" of the presumption, that is, to make it somehow disappear, is still

nothing more than shifting the burden to the defendant. This approach to presumptions is a very commonly used form in the fifty states, and is known as the "Thayer-Wigmore" or "Bubble-Bursting"[2] McCormick, Evidence, §345 (2d ed. 1978). Georgia adopts this approach in many types of civil cases. Templeton v. Kennesaw Life & Accident Ins. Co., 216 Ga. 770, 119 S.E.2d 549 (1961), Belch v. Gulf Nat. Life Ins. Co., 219 Ga. 823, 136 S.E.2d 351 (1964). See also Agnor, Georgia Evidence, §17-8 (1976).

The basic idea is that at the outset of the trial, before any evidence is introduced, there is a presumption of fact against the party against whom the

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[2] See also State v. Dacey, 138 Vt. 491, 496, 418 A.2d 856, 859 (1980), where the Vermont Supreme Court found a similar DUI presumption-charge to constitute a Thayer-Wigmore presumption.

presumption is entered (here the petitioner-defendant). This presumption is of such nature, that even if the party seeking to establish the presumption (here the State) presents no evidence whatsoever of the defendant's guilt, the State can withstand a motion for a directed verdict by the defendant; the reason being the presumption can only disappear in the jury room. McCormick, Evidence, §345 (2d ed. 1978), Agnor, Georgia Evidence, §17-8 (1976).

This type of presumption is the most burden-shifting, since no evidence is required to activate it, and the party entering the presumption may withstand a directed verdict (which here would be the State) without propounding any evidence.

Of course, this may be fine for civil cases, but the operative principle of a "Thayer-Wigmore" "bubble-bursting" presumption is repugnant to the very essence of our criminal justice system.

Clearly then, the Court of Appeals' rationale for finding the jury charge in the case at bar not to be burden shifting is erroneous.

In addition to the erroneous rationale for the Court of Appeals' decision in this case, there are several other important reasons why the jury charge in Petitioner's trial violated his due process rights.

The charge based on Section 392 was a clear direction to the jury to find that if the Petitioner had a blood-alcohol level of .10% or greater, he was

to be presumed to have been intoxicated unless he could present superior evidence rebutting that presumption:

> Third, if there was at that time 0.10 percent or more by weight of alcohol in the person's blood, it shall be presumed that the person was under the influence of alcohol.

Appendix, p. A-17.

The instructions mentioning that "the burden is entirely on the State...to prove the guilt of the defendant beyond a reasonable doubt," and "the defendant enters upon this trial with a presumption of innocence in his favor and that presumption remains with him unless it is overcome by evidence submitted to you which establishes his guilt beyond a reasonable doubt," Appendix, p. A-13, in no way neutralizes or ameliorates the direction to the jury to presume that the Petitioner was intoxicated upon a showing

of a .10% blood-alcohol level. See Connecticut v. Johnson, where a four man plurality of this Court held that a jury charge violating Sandstrom could never be rendered harmless by such language. _____, U.S. _____, 103 S.Ct. 969, 978, 74 L.Ed. 2d 823, 835 (1983).

The instructions at Petitioner's trial directed the jury not find the defe ndant guilty unless proven so beyond a reasonable doubt, and then the presumption defined the element to be so proven upon a showing of certain facts unless the defendant could rebut the presumtpion activated by those facts. Thus, at Petitioner's trial, the jury was told not to convict Petitioner unless his guilt was proven beyond a reasonable doubt, and then they were instructed that a showing of a blood-alcohol level of

.10% or more proved such guilt (intoxication) beyond a reasonable doubt, unless the Petitioner could somehow rebut this presumption.

Besides being burden-shifting, and therefore, violative of due process under Sandstrom v. Montana, the jury charge in the case at bar also fails to comply with another fundamental aspect of permissive charges. In permissive charges the jury must be instructed that they may ignore the presumption or inference, even when the defendant presents no evidence rebutting the presumption. Ulster County v. Allen, 442 U.S. at 162, 99 S.Ct. at 2227, 60 L.Ed 2d 795. This was obviously not done at Petitioner's trial, since the jury was instructed that the presumption disappeared upon a sufficient showing of evidence by the Petitioner to the contrary:

> But a presumption so declared by the law, is only raised by the absence of any real evidence as to the existence of the ultimate fact in question. It is not in and of itself evidence, but merely an arbitrary rule imposed by law to be applied in the absence of evidence and whenever evidence contradicting the presumption is offered, the latter disappears entirely and the triers of the fact are bound to follow the usual rules of evidence in reaching their ultimate conclusions of fact.

Appendix, p. A-16.

Logic dictates that if whenever evidence contradicting the presumption is offered, the latter presumption disappears entirely, then when no evidence is offered contradicting the presumption, it must not disappear. If it does not disappear, then it must remain intact, and the jury may not ignore it. This being so, this part of the jury charge fails to meet the minimal requirement for

a permisive instruction developed in Ulster County that the jury must be instructed that they may ignore the presumption or inference, even if the defendant presents no evidence rebutting the presumption.

Unlike other types of cases, the DUI presumption of intoxication based on a showing of a blood alcohol level of .10% or greater does not rationally flow from the facts shown. Without expert testimony, there is no way an average or typical "reasonable juror" would assume or infer a defendant's intoxication from a showing that his blood-alcohol level was 0.10 grams of alcohol per 100 cubic centimeters of blood (0.001 grams per cubic centimeter, or 0.10% grams of alcohol per cubic centimeter). The numbers here would be meaningless to the

average juror who is likely not to be a physician, a chemist, or someone familiar with the import of these numbers.

This is quite different from other type presumptions or inferences where the average person would not have to rely on the presumption to make the factual assessment. For example, a juror need not hear a jury charge that he may infer one to have intended his acts, when to that juror's satisfaction, the State has shown the defendant to have stabbed the victim 25 times. A juror need not hear a charge that he may infer theft of property by the defendant from a showing that the property was (1) stolen, (2) recently, when the State has shown that the defendant was found with the victim's jewelry in his pockets, two blocks away and five minutes after the jewelry was shown to have been taken.

In either of these examples, the inferences seem unnecessary, since just from common experience, jurors would naturally make these inferences.

This again is not so for the natural inferences or conclusions the "reasonable juror" would draw from a showing by the State that the defendant had a blood-alcohol level of 0.10 grams of alcohol per 100 cubic centimeters of blood. Without expert testimony on how various blood-alcohol levels are considered to effect "the average (weight, height, health, food intake, metabolism, etc.) person", there can be no rational connection between the fact shown (here a blood-alcohol showing of .11 grams of alcohol per 100 cubic centimeters of blood), and the presumed fact (intoxication). Without special knowledge and in the absence of expert testimony, there

is no "rational connection between the facts shown and the presumed or inferred facts", as is required by Leary v. United States, 395 U.S. 6, 89 S.Ct. 1532, 23 L.Ed.2d 57 (1969), Ulster County v. Allen, supra., and Connecticut v. Johnson, supra, for a permissive inference.

It is true this rational connection could have been made at trial using expert testimony on the physical and mental effects of various blood-alcohol levels. This, however, was not done; and as a result, rather than being "aided" or "directed" by the presumptions in inferring things the jurors might have derived from common knowledge, the jurors were simply directed to presume intoxication upon a blood-alcohol showing of .10% or greater (here .11%); their fact-finding function being usurped by these instructions.

This usurpation of the jury's responsibility violates Ulster County and the jury charge from Petitioner's trial cannot under this criterion ("rational connection") qualify as a permissive inference or presumption.

D. It Cannot Be Said With Any Significant Degree of Certainty That The Jury Found The Charge Permissive In Nature Rather Than Mandatory.

The effect of a presumption in a jury instruction is determined by the way in which a reasonable juror could have interpreted it, not by a state court's interpretation of its legal impact. Sandstrom v. Montana, 442 U.S. at 510, 99 S.Ct. at 2452, 61 L.Ed. 2d at 42. However, it is also recognized that a single instruction to the jury may not be judged in artificial isolation, but must

be viewed in the context of the overall charge. Cupp v. Naughten , 414 U.S. 141, 146, 94 S.Ct. 396, 400, 38 L.Ed.2d 368, 373 (1973).

In light of all of the above mentioned reasons why the jury charge in Petitioner's trial was a burden-shifting presumption, it would indeed be extremely difficult, if not impossible, for this Court to say that it is "certain" that the jury found the charge to be a permissive inference or presumption.

> But more significantly, even if a jury could have ignored the presumption and found the Defendant guilty, we cannot be certain that this is what they did do.

Sandstrom v. Montana, 442 U.S. at 526, 99 S.Ct. at 2460, 61 L.Ed.2d at 52.

E. Even If Section 40-6-392(b)(3) Could Somehow Be Found Not Violative Of Due

Process, Its Application In The Case At Bar Was Still Violative Of the Basic Due Process Requirement Of The United States Constitution.

The very essence of a statutory presumption is to shift the burden of proof and the burden of persuasion to the party against whom the presumption is entered. McCormick, Evidence, §343 (2d. Ed. 1978). The presumption created by charging on section 40-6-392(b)(3) (formerly §902.1) is no exception. As explained in Section I of this brief, §392(b)(3) is clearly such a burden-shifting presumption and is, therefore, violative of due process.

However, the presumption of §392(b)(3) can only shift the burden of proof and persuasion when the trier of the fact is made aware of its existence and instructed in its application. So even if the "presumption" is on its face

violative of due process under Sandstrom v. Montana, if its meaning was conveyed to the jury in the form of a "permissive inference," it may not truly be said that the defendant has been denied due process of law. See County Court of Ulster County, New York v. Allen, 442 U.S. 140, 99 S.Ct. 2213, 60 L.Ed.2d 777 (1979). This, however, was not the case at Petitioner's trial since it would have been difficult if not impossible to make the jury charge at that trial any more burden-shifting than it already was.

It is understandable that this court might be very hesitant about invalidating the Georgia D.U.I. statutory presumption, no matter how burden shifting and violative of fundamental constitutional rights this presumption may be. Drunk driving is, of course, a matter of very serious public concern. Yet protection

of individual rights, especially the right to a fair trial, is also a matter of very serious public concern. When the State is relieved of the burden of proving its case beyond a reasonable doubt, the defendant has simply been denied a fair trial.

If this court is bent on making every effort possible to defend the Georgia D.U.I. presumption (Official Code of Ga. Ann. §40-6-392(b)(3) d(Michie 1982)) from Petitioner's due process challenge, yet also does not want to ignore an accused's right to a fair trial, it may consider a position that arguably may protect both (or at least not substantially ignore either one).

One such approach was taken by the Vermont Supreme Court in State v. Dacey, 138 Vt. 491, 418 A.2d 856 (1980). Dacey dealt with a constitutional challenge to

the Vermont D.U.I. statutory presumption of intoxication. This statute is functionally similar to the Georgia D.U.I. statutory presumption (§40-6-392(b)(3)), and reads as follows:

> If there was at that time 0.10 percent or more by weight of alcohol in the person's blood. . . as shown by chemical analysis of the person's blood or breath, it shall be presumed that the person was under the influence of intoxicating liquor in violtion of section 1201(a)(2) or (3) of this title. . .

23 V.S.A. §1204(a)(3).

The statutory presumption was, however, qualified by another provision in the Vermont D.U.I. statute:

> The foregoing provisions shall not be construed as limiting the introduction of any other competent evidence bearing upon the question whether the person was under the influence of intoxicating liquor.

23 V.S.A. §1204(c).

In Dacey, the judge charged the jury on 23 V.S.A. §1204 as follows:

> This presumption, however, is a presumption of fact only. It is not a presumption of guilt. The defendant retains his presumption of innocence throughout this trial, and is at liberty to introduce evidence in an effort to show that in spite of the breath test, he was not under the influence.
>
> If testimony of the defendant and his witnesses fairly and reasonably tends to show that he was not under the influence at the time in question, the statutory presumption disappears and is of no further effect.
>
> In other words, the State has the benefit of the presumption that a breath test of more than point one zero by weight, means that the defendant was under the influence of intoxicating liquor.
>
> If you do not believe the testimony of the defendant, introduced to rebut this presumption, the presumption stands. If you find the test valid in all respects, if you

> believe that the defendant was not under the influence, however, the presumption disappears and you'll find him not guilty. It is for you to consider all the evidence introduced on this question, and give it just such weight as you think it is fairly entitled to receive.

138 Vt. at 494, 418 A.2d at 857, 858.

The Vermont Supreme Court held that this jury charge violated the due process standards of Sandstrom v. Montana and reversed the conviction. 138 Vt. at 496, 497, 418 A.2d at 859. However, that court refused to find the Vermont D.U.I. presumption (23 V.S.A. §1204) unconstitutional on its face.

The Vermont Supreme Court held that §1204 on its face created only a "permissive inference" which could be considered with other evidence and supposedly does not shift the burden of proof or persuasion to the defendant. Thus, this due

process challenge shattered only the jury charge based on the statutory presumption but not the statute itself.[3] The reasoning process here was obviously based on an avowed reluctance to overturn the Vermont D.U.I. law, and recognition by that court of that defendant clearly being denied due process of law. It would seem that the Vermont Supreme Court might have wanted to protect the statutory presumption so that in the future, more "permissive" jury charges may be based on it.

The jury charge given at Petitioner's trial is very similar to that held unconstitutional in the Dacey case. Although based on the discussion in Section I of this brief, it would be

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[3] Thus, the Vermont Supreme Court is saying that §1204 is only unconstitutional if it is used, since the only function of such a presumption is in formulating a jury charge.

quite difficult to see how this Court could find both O.C.G.A. §40-6-392(b)(3) and the jury charge from Petitioner's trial not violative of due process under Sandstrom v. Montana, Ulster County v. Allen, and Connecticut v. Johnson. It would be even more difficult to imagine this Court at least not finding the jury charge alone from Petitioner's trial violative of due process.

II. PETITIONER'S DUE PROCESS CHALLENGE SHOULD NOT HAVE BEEN BARRED FROM CONSIDERATION ON THE MERITS BY THE GEORGIA COURTS, NOR CAN IT BE BARRED FROM SUCH CONSIDERATION BY THIS COURT, BY A QUASI-PROCEDURAL GIMMICK DEVELOPED BY THE GEORGIA COURT OF APPEALS.

As noted previously in section A of the statement of the case in this petition, the Georgia Court of Appeals originally passed on Petitioner's due

process challenge of Section 40-6-392 for consideration by the Georgia Supreme Court, Appendix, p. A-12. The basis for this action by the Court of Appeals was that since this appeal was based on a constitutional challenge to a State statute which had not previously been raised in Georgia, the Georgia Supreme Court had proper jurisdiction over consideration of the constitutional challenge. Id.

The Georgia Supreme Court, however, did not agree with the Court of Appeals' jurisdictional analysis and remanded Petitioner's appeal for review by the Court of Appeals. Appendix, p. A-2,3.

In section one of their decision on Petitioner's appeal, the Georgia Court of Appeals held:

> This case was transferred to the Supreme Court for its consideration of the constitutional argument. That

> court transferred the case back to this Court without opinion or other comment. The Supreme Court's refusal to review McCann's constitutional challenge to O.C.G.A. §40-6-392 renders such contention without merit.

McCann v. State, No. 66,203 (Ga. App. June 21, 1983). Appendix, p. A-4.

Besides being a blatantly false statement of the facts, this holding expresses a principle of law developed by the Georgia Court of Appeals to sidestep consideration of a constitutional issue by a nonsensical quasi-procedural gimmick.

In their order remanding Petitioner's constitutional challenge to the Court of Appeals for consideration by that Court, the Georgia Supreme Court held:

> Although this particular statute has not been upheld against this specific constitutional attack; nevertheless, the issue involved

> is a mere application of the Constitution to this statute, of which the Court of Appeals has jurisdiction.

Appendix, p. A-2,3.

This order of the Georgia Supreme Court was beyond any "opinion or other comment". It was a clear direction to the Court of Appeals to consider the constitutional challenge on its merits.

The quasi-procedural gimmick used to bury Petitioner's constitutional challenge from consideration on the merits by the Georgia Courts has been used on several other occasions by the Georgia Court of Appeals. See Cassells v. Bradlee, 161 Ga. App. 325, 291 S.E.2d 48 (1982), and Denton v. State, 154 Ga. App. 427, 268 S.E.2d 725 (1980). Because such practice serves no purpose other than to sidestep consideration of constitutional issues, such practice

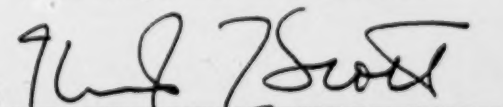
itself has no procedural or substantive value, and certainly cannot serve to bar consideration of Petitioner's constitutional challenge by this Court.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

SCOTT AND QUARTERMAN
Attorneys for Petitioner

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APPENDIX

Georgia Court Judgments and Decrees:

Court of Appeals of the State of Georgia
Atlanta, Georgia, December 22, 1982

The Honorable Court of Appeals met pursuant to adjournment. The following order was passed:

65357. William R. McCann v. The State

This is an appeal from a conviction for driving under the influence of alcohol in which a statutory presumption of Code Ann. §68A-902.1(b)(1) that "if there was at that time (of driving) 0.10 percent or more by weight of alcohol in the person's blood, it shall be presumed that the person is under the influence of alcohol," is attacked as unconstitutional.

The issue was preserved for appeal when the trial court after instructing on the presumption in his charge failed to ask counsel if there were any exceptions or objections to the charge. White v. State, 243 Ga. 250.

No cases have been found in which the constitutionality of this presumption has been ruled upon the appellate courts of this state. Therefore, the Supreme Court has jurisdiction over this case. Code Ann. §2-3104; Burke v. State, 205 Ga. 520.

Moreover, as there may be some question as to whether the issue was properly raised at the trial level, the Supreme Court should make that determination. Compare, Barnes v. State, 244 Ga. 302(1) and Simmons v. State, 246 Ga. 390, 391, with Arp v. State, 249 Ga. 403(1) and Hardison v. Haslam, 250 Ga. 59(3).

Supreme Court of Georgia
Atlanta, February 4, 1983

The Honorable Supreme Court met pursuant to adjournment. The following order was passed:

39574. McCann v. The State.

In this appeal from a DUI conviction, the statutory presumption of Code Ann. §68A-902.1(b)(3) -- that driving with a .10% or more blood-alcohol content constitutes DUI -- is attacked as unconstitutional under the 14th Amendment to the United States Constitution and the corresponding section of the Georgia Constitution, on the ground that it "usurps the fact-finding duties of the jury, and relieves the State of its burden to prove all of the elements of a criminal offense beyond a reasonable doubt."

Although this particular statute has not been upheld against this specific constitutional attack; nevertheless, the issue involved is a mere application of the Constitution to this statute, of

which the Court of Appeals has jurisdiction. See Garrett v. Dept. of Public Safety, 237 Ga. 413, and Johnson v. State, 236 Ga. 370, cited therein.

Accordingly, the appeal is transferred to the Court of Appeals.

Court of Appeals of the State of Georgia
Atlanta, Georgia, June 21, 1983

66203. McCann v. The State (Bi-101)

BIRDSONG, Judge.

William B. McCann was convicted of speeding and driving under the influence of alcohol. The only evidence offered by the state showed that McCann was detected by radar speeding approximately 60 mph in a 45 mph zone. Upon being stopped, the officer detected the odor of alcohol upon McCann's breath and secured McCann's consent to take a breatholizer test, which indicated an alcohol level of .11. Apparently it was upon the basis of the speed, odor of alcohol, and the alcohol level that McCann was charged with DUI, inasmuch as the officer detected no erratic driving (other than speeding) or aberrational physical conduct. The trial court charged upon the legal presumption raising from the .11 breatholizer reading it is upon this charge that McCann brings this appeal. McCann asserts that the statute is unconstitutional for mandating a presumption of intoxication if the

reading is above .10 and that the charge based upon the statute shifted the burden to the appellant.

Held:

1. We reject the constitutional argument offered by Appellant. This case was transferred to the Supreme Court for its consideration of the constitutional argument. That court transferred the case back to this court without opinion or other comment. The Supreme Court's refusal to review McCann's constitutional challenges to O.C.G.A. §40-6-392 renders such contention without merit. Cassells v. Bradlee Management Services, 161 Ga. App. 325, 326 (1) (291 SE2d 48); Denton v. State, 154 Ga. App. 427 (2) (268 SE2d 725).

2. In construing the charge of the court in relation to a shifting of the burden, we have carefully examined the relevant portions of the charge in context with the entire charge. In this regard the court charged: "Now, upon the trial of any criminal proceeding arising out of acts alleged to have been committed by any person while driving. . .a moving vehicle while under the influence of alcohol, the amount of alcohol in the person's blood at the time alleged as shown by chemical analysis of such person's...breath...shall give rise to certain inferences or persumptions. Now, relative to presumptions, I charge you that all legal presumptions are rebuttable...but in truth, there is but one type of presumption in the strict legal

meaning of the word and that is merely a general rule of law that under some circumstances in the absence of any evidence to the contrary, a jury is compelled to reach a certain conclusion or fact. But a presumption so declared by the law, is only raised by the absence of any real evidence as to the existence of the ultimate fact in question. It is not in and of itself evidence, but merely an arbitrary rule imposed by law to be applied in the absence of evidence and whenever evidence contradicting the presumption is offered, the latter disappears entirely and the triers of the fact are bound to follow the usual rules of evidence in reaching their ultimate conclusions of fact. However, in mentioning the fact that whenever evidence contradicting the presumption is offered, this does not alter the rule of law that there is no burden whatsoever on a defendant to offer any testimony or any evidence whatsoever in support of his innocence. The burden is entirely on the state as I have previously charged you, to prove the guilt of the defendant beyond a reasonable doubt."

In this case, appellant offered evidence through the arresting officer, his wife and himself that he had consumed a minimal amount of beer over a sustained period, exercised vigorously while playing golf, eaten a meal, and both his wife and the officer indicated he appeared "normal". Thus in accordance with the charge of the court, the "presumption" raised by the .11 reading "disappeared" in the face of this

contradictory evidence, and the jury was required to determine the issue of driving while intoxicated based upon the "usual rules of evidence." Thus, the jury was required to determine the state of intoxication (i.e., whether McCann was less safe a driver because of alcohol) based upon the appellant's asserted "normal" condition in comparison with his admitted consumption of alcoholic beverages, manifested by his conduct in speeding in disregard of the posted limit and the odor upon his breath.

Viewing the charge of the court in its entirety, we are amply satisfied that the charge on the "presumption" authorized by a breatholizer reading of more than .10 alcohol in the blood created merely a "permissive presumption" of the type considered in County Court of Ulster County v. Allen, 442 U.S. 140 (99 SC 2213, 60 LE2d 777). Such a presumption allows, but does not require, the trier of fact to infer the elemental fact from proof by the prosecutor of a basic one. Moreover, we are conviced that the charge in this case did not place any kind of burden upon the appellant. Skrine v. State, 244 Ga. 520, 521 (260 SE2d 900); Burdett v. State, 159 Ga. App. 394(2) (283 SE2d 622). We find no merit in the argument that the charge of the court shifted the burden to the appellant.

Judgment affirmed. Shulman, C. J., and McMurray, P. J., concur.

Court of Appeals of the State of Georgia
Atlanta, July 8, 1983

The Honorable Court of Appeals met pursuant to adjournment.

The following order was passed:

66203. William R. McCann v. The State.

Upon consideration of the motion for a rehearing filed in this case, it is ordered that it is hereby denied.

Alton Hawk, Clerk

Clerk's Office, Supreme Court of Georgia

Dear Sir:

Case No. 40203.

McCann v. The State.

The Supreme Court today denied the writ of certiorari in this case.

All the Justices concur.

Very truly yours,

Mrs. Joline B. Williams
Clerk

In The State Court of Clarke County

The State of Georgia
vs.
William R. McCann

Case No. 23,999
Charge: DUI (Verdict of Guilty)
November Term, 1980.

The Defendant being before the Bar of the Court and showing no reason why the sentence of the Court should not be pronounced;

IT IS, THEREUPON, CONSIDERED, ORDERED AND ADJUDGED by the Court that the said William R. McCann be, and herein is, sentenced to confinement in (such institution under the jurisdiction of the State Board of Corrections as the Director of Corrections may direct), where the said Defendant shall be confined at labor for a term of 12 months, to be computed according to law...

...The Court having examined the cause, it is further ordered that the above sentence may be served on probation...

...IT IS FURTHER ORDERED by the Court that the Defendant pay a fine of $250.00 as a condition precedent to probation...

This the 11th day of December, 1980.

/s/ Grady C. Pittard, Jr.
Judge, State Court of Clarke County, Georgia

IN THE STATE COURT OF CLARKE
COUNTY, GEORGIA

THE STATE
VS.
WILLIAM R. McCANN

FILE NO. 23999

ORDER

Motion for New Trial in this case coming on regularly to be heard and opportunity for argument being afforded counsel, it is considered, ordered, and adjudged that a new trial be, and the same is, hereby refused.

This the 1st day of September, 1982.

/s/ Grady C. Pittard, Jr.
Judge, State Court of Clarke
County, Georgia

Statutory Provisions:

Official Code of Ga. Ann. §40-6-391 (Michie, 1982), formerly Ga. Code Ann. §68A-902 (Harrison, 1974):

Driving under the influence of alcohol or drugs.

(a) A person shall not drive or be in actual physical control of any moving vehicle while:

1. Under the influence of alcohol.

Official Code of Ga. Ann. §40-6-392 (Michie, 1983), formerly Ga. Code Ann. §68A-902 (Harrison, 1974):

Chemical tests for alcohol or drugs in blood.

(a) Upon the trial of any civil or criminal action or proceeding arising out of acts alleged to have been committed by any person in violation of Code Section 40-6-391, evidence of the amount of alcohol or drug in a person's blood at the alleged time, as determined by a chemical analysis of the person's blood, urine, breath, or other bodily substance shall be admissible. Where such a chemical test is made, the following provisions shall apply:

(1) If there was at that time 0.05 percent or less by weight of alcohol in the person's blood, it shall be presumed that the person was not under the influence of alcohol, as prohibited by paragraphs (1), (2), and (3) of subsection (a) of Code Section 40-6-391;

(2) If there was at that time in excess of 0.05 percent but less than 0.10 percent by weight of alcohol in the person's blood, such fact shall not give rise to any presumption that the person was or was not under the influence of alcohol, as prohibited by paragraphs (1), (2), and (3) of subsection (a) of Code Section 40-6-391, but such fact may be considered with other competent evidence in determining whether the person was under the influence of alcohol, as prohibited by paragraphs (1), (2), and (3) of subsection (a) of Code Section 40-6-391;

(3) If there was at that time 0.10 percent or more by weight of alcohol in the person's blood, it shall be presumed that the person was under the influence of alcohol, as prohibited by paragraphs (1), (2), and (3) of subsection (a) of Code Section 40-6-391;

(4) If there was at that time 0.12 percent or more by weight of alcohol in the person's blood, the person shall be in violation of paragraph (4) of subsection (a) of Code Section 40-6-391.

Constitutional Provisions:

U. S. Const. Amend. 14

Section 1.
(Citizenship Rights Not to Be Abridged by States)

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Relevant Sections of Jury Charge at Petitioner's Trial:

The Defendant enters upon this trial with a presumption of innocence in his favor and that presumption remains with him throughout the trial unless and until it is overcome by evidence submitted to you which establishes his guilt beyond a reasonabe doubt. (T.28, line 21 - 29, line 1)...

...Now, Ladies and Gentlemen, the law of this state provides that it is unlawful for any person who is under the influence of alcohol to drive or to be in actual physical control of any moving vehicle on the public highways or elsewhere in this state. The offense condemned in this statute may be committed in more than one way: first, by a person driving a moving vehicle while under the influence of alcohol and second, by a person being in actual control of a moving vehicle while under the influence of alcohol. Now, proof of either one of these prohibited acts will support a conviction. Now, the essential ingredients of the offense are the driving or the being in control of a moving vehicle by the accused at a time while under the influence of some alcohol. The State need now show that the defendant was drunk, but only that he was under the influence of alcohol. In the eyes of the law, the operator of a motor vehicle is under the influence of alcohol when he is so affected by it as to make it less safe for him to drive, operate, or be in control of a vehicle than it would be if he were not affected

by such alcohol. This is the true rule in such cases and anything less than this would not authorize a verdict of guilty. Now, whether the Defendant in this case was under the influence under this rule is an ultimate fact you must decide. This is not a matter of opinion alone, but a matter of proof and it may be proved either by direct or circumstantial evidence, including the opinion of witnesses whom you think worty of belief. (T.32, line 10 - 33, line 12)...

...Now, the State of Georgia considers that persons who are under the influence of alcohol while operating a motor vehicle constitute a direct and immediate threat to the welfare and safety of the general public. Therefore, any person who operates a motor vehicle upon the highways of this state, shall be deemed to have given consent to a chemical test or tests of his blood if arrested for any offense arising out of acts alleged to have been committed while the person was driving or was in actual physical control of a moving vehicle while under the influence of alcohol. The test or tests shall be administered at the request of a law enforcement officer having reasonable grounds to believe that the person has been driving or was in actual physical control of a motor vehicle upon the highways or elsewhere in this state while under the influence of alcohol. Now, upon the trial of any criminal proceeding arising out of acts alleged to have been committed by a person while driving or in actual physical control of a vehicle while under the influence of alcohol,

evidence of the amount of alcohol in a person's blood at the alleged time as determined by a chemical analysis of such person's blood, urine, breath, or other bodily substance shall be admissible. Where such a chemical test is made, the following provisions shall apply. Chemical analysis of the person's blood, urine, breath, or other bodily substance to be considered valid under the provisions of this law shall have been performed according to methods approved by and by an individual possessing a valid permit issued by the State Crime Laboratory for this purpose. The State Crime Laboratory is authorized to approve satisfactory techniques or methods, to ascertain the qualifications and competence of individuals to conduct analyses, and to issue permits which shall be subject to termination or revocation at the discretion of the State Crime Laboratory. Percent by weight of alcohol in the blood shall be based upon grams of alcohol per one hundred cubic centimeters of blood.

Now, upon this trial of any criminal proceeding arising out of acts alleged to have been committed by any person while driving or in actual physical control of a moving vehicle while under the influence of alcohol, the amount of alcohol in the person's blood at the time alleged as shown by chemical analyses of such person's blood, urine, breath, or other bodily substance shall give rise to certain inferences or presumptions.

Now, relative to presumptions, I charge you that all legal presumptions are rebuttable. There has been much erroneous thinking and more loose language in regard to presumptions. We read of presumptions of law, presumptions of fact, conclusive presumptions, disputable presumptions, but in truth, there is but one type of presumption in the strict legal meaning of the word and that is merely a general rule of law that under some circumstances in the absence of any evidence to the contrary, a jury is compelled to reach a certain conclusion or fact. But a presumption so declared by the law is only raised by the absence of any real evidence as to the existence the ultimate fact in question. It was not in and of itself evidence, merely an arbitrary rule imposed by law to be applied in the absence of evidence and whenever evidence contradicting the presumption is offered, the latter disappears entirely and the triers of the fact are bound to follow the usual rules of evidence in reaching their ultimate conclusions of fact. However, in mentioning the fact that whenever evidence contradicting the presumption is offered, this does not alter the rule of law that there is no burden whatsoever on a Defendant to offer any testimony or any evidence whatsoever in support of his innocence. The burden is entirely on the State as I have previously charged you, to prove the guilt of the Defendant beyond a reasonable doubt.

These, then, are the presumptions of law which are raised and which may be considered by you in your deliberations. First, if there was at the time of making the test, breath test, blood test, urine test, or other bodily substance, there was at that time 0.05 percent or less by weight of alcohol in the person's blood, it shall be presumed that the person was not under the influence of alcohol. If there was at that time in excess of 0.05 percent but less than 0.10 percent by weight of alcohol in the person's blood, such fact shall not give rise to any presumption that the person was or was not under the influence of alcohol, but such fact may be considered with other competent evidence in determining whether the person was under the influence of alcohol. Third, if there was at that time 0.10 percent or more by weight of alcohol in the person's blood, it shall be presumed that the person was under the influence of alcohol. (T.34, line 23 - 38, line 15).

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NO. 83-757

IN THE SUPREME COURT OF THE

UNITED STATES

October Term, 1983

WILLIAM R. McCANN,
Petitioner

VS.

STATE OF GEORGIA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

SUPPLEMENTAL APPENDIX

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APPENDIX

Georgia Court Judgments and Decrees:

Court of Appeals of the State of Georgia

Atlanta, Georgia, December 22, 1982

The Honorable Court of Appeals met pursuant to adjournment. The following order was passed:

65357. William R. McCann v. The State

This is an appeal from a conviction for driving under the influence of alcohol in which a statutory presumption of Code Ann. §68A-902.1(b)(1) that "if there was at that time (of driving) 0.10 percent or more by weight of alcohol in the person's blood, it shall be presumed that the person is under the influence of alcohol," is attacked as unconstitutional.

The issue was preserved for appeal when the trial court after instructing on the presumption in his charge failed to ask counsel if there were any exceptions or objections to the charge. White v. State, 243 Ga. 250.

No cases have been found in which the constitutionality of this presumption has been ruled upon the appellate courts of this state. Therefore, the Supreme Court has jurisdiction over this case. Code Ann. §2-3104; Burke v. State, 205 Ga. 520.

Moreover, as there may be some question as to whether the issue was properly raised at the trial level, the Supreme Court should make that determination. Compare, Barnes v. State, 244 Ga.

302(1) and Simmons v. State, 246 Ga. 390, 391, with Arp v. State, 249 Ga. 403(1) and Hardison v. Haslam, 250 Ga. 59(3).

Supreme Court of Georgia
Atlanta, February 4, 1983
The Honorable Supreme Court met pursuant to adjournment. The following order was passed:

39574. McCann v. The State.

In this appeal from a DUI conviction, the statutory presumption of Code Ann. §68A-902.1(b)(3) -- that driving with a .10% or more blood-alcohol content constitutes DUI -- is attacked as unconstitutional under the 14th Amendment to the United States Constitution and the corresponding section of the Georgia Constitution, on the ground that it "usurps the fact-finding duties of the

jury, and relieves the State of its burden to prove all of the elements of a criminal offense beyond a reasonable doubt."

Although this particular statute has not been upheld against this specific constitutional attack; nevertheless, the issue involved is a mere application of the Constitution to this statute, of which the Court of Appeals has jurisdiction. See Garrett v. Dept. of Public Safety, 237 Ga. 413, and Johnson v. State, 236 Ga. 370, cited therein.

Accordingly, the appeal is transferred to the Court of Appeals.

Court of Appeals of the State of Georgia
Atlanta, Georgia, June 21, 1983
66203. McCann v. The State (Bi-101)

BIRDSONG, Judge.

William B. McCann was convicted of speeding and driving under the influence of alcohol. The only evidence offered by the state showed that McCann was detected by radar speeding approximately 60 mph in a 45 mph zone. Upon being stopped, the officer detected the odor of alcohol upon McCann's breath and secured McCann's consent to take a breatholizer test, which indicated an alcohol level of .11. Apparently it was upon the basis of the speed, odor of alcohol, and the alcohol level that McCann was charged with DUI, inasmuch as the officer detected no erratic driving (other than speeding) or aberrational physical conduct. The trial court charged upon the legal presumption raising from the .11 breatholizer reading it is upon this charge that McCann brings this appeal. McCann asserts that the

statute is unconstitutional for mandating a presumption of intoxication if the reading is above .10 and that the charge based upon the statute shifted the burden to the appellant.

Held:

1. We reject the constitutional argument offered by Appellant. This case was transferred to the Supreme Court for its consideration of the constitutional argument. That court transferred the case back to this court without opinion or other comment. The Supreme Court's refusal to review McCann's constitutional challenges to O.C.G.A. §40-6-392 renders such contention without merit. Cassells v. Bradlee Management Services, 161 Ga. App. 325, 326 (1) (291 SE2d 48); Denton v. State, 154 Ga. App. 427 (2) (268 SE2d 725).

2. In construing the charge of the court in relation to a shifting of the burden, we have carefully examined the relevant portions of the charge in context with the entire charge. In this regard the court charged: "Now, upon the trial of any criminal proceeding arising out of acts alleged to have been committed by any person while driving. . .a moving vehicle while under the influence of alcohol, the amount of alcohol in the person's blood at the time alleged as shown by chemical analysis of such person's...breath...shall give rise to certain inferences or persumptions. Now, relative to presumptions, I charge you that all legal presumptions are rebuttable...but in truth, there is but one type of presumption in the strict legal meaning of the word and that is merely a

general rule of law that under some circumstances in the absence of any evidence to the contrary, a jury is compelled to reach a certain conclusion or fact. But a presumption so declared by the law, is only raised by the absence of any real evidence as to the existence of the ultimate fact in question. It is not in and of itself evidence, but merely an arbitrary rule imposed by law to be applied in the absence of evidence and whenever evidence contradicting the presumption is offered, the latter disappears entirely and the triers of the fact are bound to follow the usual rules of evidence in reaching their ultimate conclusions of fact. However, in mentioning the fact that whenever evidence contradicting the presumption is offered, this does not alter the rule of

law that there is no burden whatsoever on a defendant to offer any testimony or any evidence whatsoever in support of his innocence. The burden is entirely on the state as I have previously charged you, to prove the guilt of the defendant beyond a reasonable doubt."

In this case, appellant offered evidence through the arresting officer, his wife and himself that he had consumed a minimal amount of beer over a sustained period, exercised vigorously while playing golf, eaten a meal, and both his wife and the officer indicated he appeared "normal". Thus in accordance with the charge of the court, the "presumption" raised by the .11 reading "disappeared" in the face of this contradictory evidence, and the jury was required to determine the issue of

driving while intoxicated based upon the "usual rules of evidence." Thus, the jury was required to determine the state of intoxication (i.e., whether McCann was less safe a driver because of alcohol) based upon the appellant's asserted "normal" condition in comparison with his admitted consumption of alcoholic beverages, manifested by his conduct in speeding in disregard of the posted limit and the odor upon his breath.

Viewing the charge of the court in its entirety, we are amply satisfied that the charge on the "presumption" authorized by a breatholizer reading of more than .10 alcohol in the blood created merely a "permissive presumption" of the type considered in County Court of Ulster County v. Allen, 442 U.S. 140 (99 SC 2213, 60 LE2d 777). Such a presumption

allows, but does not require, the trier of fact to infer the elemental fact from proof by the prosecutor of a basic one. Moreover, we are conviced that the charge in this case did not place any kind of burden upon the appellant. Skrine v. State, 244 Ga. 520, 521 (260 SE2d 900); Burdett v. State, 159 Ga. App. 394(2) (283 SE2d 622). We find no merit in the argument that the charge of the court shifted the burden to the appellant.

Judgment affirmed. Shulman, C. J., and McMurray, P. J., concur.

Court of Appeals of the State of Georgia
Atlanta, July 8, 1983
The Honorable Court of Appeals met pursuant to adjournment.
The following order was passed:
66203. William R. McCann v. The State.

Upon consideration of the motion for a rehearing filed in this case, it is ordered that it is hereby denied.

Alton Hawk, Clerk

Clerk's Office, Supreme Court of Georgia

Dear Sir:

Case No. 40203.

McCann v. The State.

The Supreme Court today denied the writ of certiorari in this case.

All the Justices concur.

Very truly yours,

Mrs. Joline B. Williams
Clerk

In The State Court of Clarke County

The State of Georgia

vs.

William R. McCann

Case No. 23,999

Charge: DUI (Verdict of Guilty)

November Term, 1980.

The Defendant being before the Bar of the Court and showing no reason why the sentence of the Court should not be pronounced;

IT IS, THEREUPON, CONSIDERED, ORDERED AND ADJUDGED by the Court that the said William R. McCann be, and herein is, sentenced to confinement in (such institution under the jurisdiction of the State Board of Corrections as the Director of Corrections may direct), where the said Defendant shall be confined at labor for a term of 12 months, to be computed according to law...

...The Court having examined the cause, it is further ordered that the above sentence may be served on probation...

...IT IS FURTHER ORDERED by the Court that the Defendant pay a fine of $250.00 as a condition precedent to probation...

This the 11th day of December, 1980.

/s/ Grady C. Pittard, Jr.
Judge, State Court of Clarke County, Georgia

IN THE STATE COURT OF CLARKE

COUNTY, GEORGIA

THE STATE

VS.

WILLIAM R. McCANN

FILE NO. 23999

ORDER

Motion for New Trial in this case coming on regularly to be heard and opportunity for argument being afforded counsel, it is considered, ordered, and adjudged that a new trial be, and the same is, hereby refused.

This the 1st day of September, 1982.

/s/ Grady C. Pittard, Jr.
Judge, State Court of Clarke County, Georgia

Statutory Provisions:

Official Code of Ga. Ann. §40-6-391 (Michie, 1982), formerly Ga. Code Ann. §68A-902 (Harrison, 1974):

Driving under the influence of alcohol or drugs.

(a) A person shall not drive or be in actual physical control of any moving vehicle while:

1. Under the influence of alcohol.

Official Code of Ga. Ann. §40-6-392 (Michie, 1983), formerly Ga. Code Ann. §68A-902 (Harrison, 1974):

Chemical tests for alcohol or drugs in blood.

(a) Upon the trial of any civil or criminal action or proceeding arising out of acts alleged to have been committed by any person in violation of Code Section 40-6-391, evidence of the amount of alcohol or drug in a person's blood at the alleged time, as determined by a chemical analysis of the person's blood, urine, breath, or other bodily substance shall be admissible. Where such a chemical test is made, the following provisions shall apply:

(1) If there was at that time 0.05 percent or less by weight of alcohol in the person's blood, it shall be presumed that the person was not under the influence of alcohol, as prohibited by paragraphs (1), (2), and (3) of subsection (a) of Code Section 40-6-391;

(2) If there was at that time in excess of 0.05 percent but less than 0.10 percent by weight of alcohol in the person's blood, such fact shall not give rise to any presumption that the person was or was not under the influence of alcohol, as prohibited by paragraphs (1), (2), and (3) of subsection (a) of Code Section 40-6-391, but such fact may be considered with other competent evidence in determining whether the person was under the influence of alcohol, as

prohibited by paragraphs (1), (2), and (3) of subsection (a) of Code Section 40-6-391;

(3) If there was at that time 0.10 percent or more by weight of alcohol in the person's blood, it shall be presumed that the person was under the influence of alcohol, as prohibited by paragraphs (1), (2), and (3) of subsection (a) of Code Section 40-6-391;

(4) If there was at that time 0.12 percent or more by weight of alcohol in the person's blood, the person shall be in violation of paragraph (4) of subsection (a) of Code Section 40-6-391.

Constitutional Provisions:

U. S. Const. Amend. 14

Section 1.

(Citizenship Rights Not to Be Abridged by States)

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Relevant Sections of Jury Charge at Petitioner's Trial:

The Defendant enters upon this trial with a presumption of innocence in his favor and that presumption remains with him

throughout the trial unless and until it is overcome by evidence submitted to you which establishes his guilt beyond a reasonabe doubt. (T.28, line 21 - 29, line 1)...

...Now, Ladies and Gentlemen, the law of this state provides that it is unlawful for any person who is under the influence of alcohol to drive or to be in actual physical control of any moving vehicle on the public highways or elsewhere in this state. The offense condemned in this statute may be committed in more than one way: first, by a person driving a moving vehicle while under the influence of alcohol and second, by a person being in actual control of a moving vehicle while under the influence of alcohol. Now, proof of either one of these prohibited acts will support a conviction. Now, the

essential ingredients of the offense are the driving or the being in control of a moving vehicle by the accused at a time while under the influence of some alcohol. The State need now show that the defendant was drunk, but only that he was under the influence of alcohol. In the eyes of the law, the operator of a motor vehicle is under the influence of alcohol when he is so affected by it as to make it less safe for him to drive, operate, or be in control of a vehicle than it would be if he were not affected by such alcohol. This is the true rule in such cases and anything less than this would not authorize a verdict of guilty. Now, whether the Defendant in this case was under the influence under this rule is an ultimate fact you must decide. This is not a matter of opinion alone,

but a matter of proof and it may be proved either by direct or circumstantial evidence, including the opinion of witnesses whom you think worty of belief. (T.32, line 10 - 33, line 12)...

...Now, the State of Georgia considers that persons who are under the influence of alcohol while operating a motor vehicle constitute a direct and immediate threat to the welfare and safety of the general public. Therefore, any person who operates a motor vehicle upon the highways of this state, shall be deemed to have given consent to a chemical test or tests of his blood if arrested for any offense arising out of acts alleged to have been committed while the person was driving or was in actual physical control of a moving vehicle while under the influence of alcohol. The test or tests

shall be administered at the request of a law enforcement officer having reasonable grounds to believe that the person has been driving or was in actual physical control of a motor vehicle upon the highways or elsewhere in this state while under the influence of alcohol. Now, upon the trial of any criminal proceeding arising out of acts alleged to have been committed by a person while driving or in actual physical control of a vehicle while under the influence of alcohol, evidence of the amount of alcohol in a person's blood at the alleged time as determined by a chemical analysis of such person's blood, urine, breath, or other bodily substance shall be admissible. Where such a chemical test is made, the following provisions shall apply. Chemical analysis of the person's blood,

urine, breath, or other bodily substance to be considered valid under the provisions of this law shall have been performed according to methods approved by and by an individual possessing a valid permit issued by the State Crime Laboratory for this purpose. The State Crime Laboratory is authorized to approve satisfactory techniques or methods, to ascertain the qualifications and competence of individuals to conduct analyses, and to issue permits which shall be subject to termination or revocation at the discretion of the State Crime Laboratory. Percent by weight of alcohol in the blood shall be based upon grams of alcohol per one hundred cubic centimeters of blood.

Now, upon this trial of any criminal proceeding arising out of acts alleged to have been committed by any person while driving or in actual physical control of a moving vehicle while under the influence of alcohol, the amount of alcohol in the person's blood at the time alleged as shown by chemical analyses of such person's blood, urine, breath, or other bodily substance shall give rise to certain inferences or presumptions.

Now, relative to presumptions, I charge you that all legal presumptions are rebuttable. There has been much erroneous thinking and more loose language in regard to presumptions. We read of presumptions of law, presumptions of fact, conclusive presumptions, disputable presumptions, but in truth, there is but one type of presumption in

the strict legal meaning of the word and that is merely a general rule of law that under some circumstances in the absence of any evidence to the contrary, a jury is compelled to reach a certain conclusion or fact. But a presumption so declared by the law is only raised by the absence of any real evidence as to the existence the ultimate fact in question. It was not in and of itself evidence, merely an arbitrary rule imposed by law to be applied in the absence of evidence and whenever evidence contradicting the presumption is offered, the latter disappears entirely and the triers of the fact are bound to follow the usual rules of evidence in reaching their ultimate conclusions of fact. However, in mentioning the fact that whenever evidence contradicting the presumption is

offered, this does not alter the rule of law that there is no burden whatsoever on a Defendant to offer any testimony or any evidence whatsoever in support of his innocence. The burden is entirely on the State as I have previously charged you, to prove the guilt of the Defendant beyond a reasonable doubt.

These, then, are the presumptions of law which are raised and which may be considered by you in your deliberations. First, if there was at the time of making the test, breath test, blood test, urine test, or other bodily substance, there was at that time 0.05 percent or less by weight of alcohol in the person's blood, it shall be presumed that the person was not under the influence of alcohol. If there was at that time in excess of 0.05 percent but less than 0.10 percent by

weight of alcohol in the person's blood, such fact shall not give rise to any presumption that the person was or was not under the influence of alcohol, but such fact may be considered with other competent evidence in determining whether the person was under the influence of alcohol. Third, if there was at that time 0.10 percent or more by weight of alcohol in the person's blood, it shall be presumed that the person was under the influence of alcohol. (T.34, line 23 - 38, line 15).

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NO. 83-757

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

WILLIAM R. McCANN,
Petitioner,

v.

STATE OF GEORGIA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF GEORGIA

BRIEF IN OPPOSITION FOR THE RESPONDENT

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QUESTIONS PRESENTED

1.

Whether O.C.G.A. § 40-6-392 is constitutional in providing that certain factual presumptions arise from given levels of blood alcohol content for purposes of defining the crime of driving under the influence of alcohol (DUI).

2.

Whether the trial court's jury charge regarding statutory factual presumptions contained in Georgia's DUI law fulfilled the Petitioner's right to due process of law.

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BRIEF IN OPPOSITION FOR THE RESPONDENT

PART ONE

STATEMENT OF THE CASE

Petitioner, William R. McCann, was tried by a jury on charges of speeding and driving under the influence of alcohol (DUI). Only the DUI charge is at issue here.

The State's evidence presented at trial showed that Petitioner had a blood alcohol level of .11 grams/cc shortly after his arrest. Petitioner's evidence tended to show that he did not exhibit behavior associated with intoxication at the time of his arrest.

Based upon this evidence, Petitioner was found guilty as charged pursuant to O.C.G.A. § 40-6-391 and sentenced to a twelve month probated term and a $250 fine.

Petitioner appealed to the Georgia Court of Appeals, which affirmed his conviction below. Certiorari was denied by the Supreme Court of Georgia. Petitioner now seeks review of his conviction by this Court on a petition for a writ of certiorari.

PART TWO

REASONS FOR NOT GRANTING THE WRIT

A. THE LANGUAGE OF O.C.G.A. § 40-6-392 IS CONSTITUTIONAL INASMUCH AS IT SETS FORTH PRESUMPTIONS OF FACT WHICH BEAR A RATIONAL CONNECTION WITH THE ULTIMATE FACT TO BE PROVED IN ACCORDANCE WITH WELL SETTLED STANDARDS ESTABLISHED BY THIS COURT.

Petitioner's assertion that O.C.G.A. § 40-6-392 unconstitutionally forces a criminal defendant to refute a presumption of guilt where his blood alcohol level exceeds .10 grams/cc is without merit. The factual presumptions created by the Georgia statute are

nothing more than permissive inferences developed to guide lay jurors in weighing scientific evidence.

As this Court explained in one of the cases relied upon by Petitioner, "[i]nferences and presumptions are a staple of our adversary system of fact finding. It is often necessary for the trier of fact to determine the existence of an element of the crime...from the existence of one or more evidentiary or basic facts." County Court of Ulster County v. Allen, 442 U.S. 140, 156, 60 L.Ed.2d 777, 99 S.Ct. 2213 (1979).

The controlling test for determining the validity of a statutory presumption is whether there is a rational connection between the facts proved and the facts presumed. Leary v. United States, 395 U.S. 6, 33, 23 L.Ed.2d 57,

89 S.Ct. 1532 (1979); Tot v. United States, 319 U.S. 463, 467 87 LEd 1519, 63 S.Ct. 1241 (1943).

Petitioner correctly asserts that a statutory presumption may not serve to shift the burden to the Defendant to disprove an element of the offense charged "by superior evidence." Brief of Petitioner, p. 19. A reading of the statute, however, reveals no reference to the weight to be accorded the factual presumptions set forth therein or the quantum of evidence required to rebut the presumptions. Indeed, the statute itself does nothing more than present guidelines which may be relied upon by a jury to the extent it deems appropriate in light of the evidence presented and the judge's charge.

The need for such guidance is readily apparent in view of several factors which have become common knowledge:

1.

The incidence of driving under the influence is a serious and growing problem faced by state lawmakers.

2.

Speedy and effective prosecution of DUI cases is essential to controlling this problem.

3.

Proof of intoxication involves sophisticated scientific and medical evidence which, absent statutory recognition of

generally accepted factual inferences, would render speedy and effective prosecution of such cases impracticable. See Brief of Petitioner, pp. 10-11, 41-42.

4.

Evidence of an individual's blood alcohol level provides a generally accepted means of inferring the probability of intoxication.

In matters such as this which are not within specialized judicial competence or completely commonplace, this Court has held that "significant weight should be accorded the capacity of [the legislative body] to amass the stuff of actual experience and cull conclusions from it." Leary v. U.S.,

supra, at 35; United States v. Gainey, 380 U.S. 63, 67, 13 L.Ed.2d 658, 85 S.Ct. 754.

There is nothing in the statute challenged by Petitioner which would prevent a jury from concluding that an individual whose blood alcohol level was .04 grams/cc was intoxicated in spite of the presumption in his favor or that one who recorded a level of .15 grams/cc was not, depending upon the weight accorded other evidence. Thus, the statute does not usurp the jury's factfinding function and is therefore constitutional on its face according to the standards established by this Court.

B. THE TRIAL COURT PROPERLY CHARGED THE JURY REGARDING THE APPLICATION OF O.C.G.A. § 40-6-392 IN COMPLIANCE WITH STANDARDS LONG ESTABLISHED BY THIS COURT REQUIRING THAT THE BURDEN OF PROOF REMAIN AT ALL TIMES ON THE STATE.

A review of the jury charge given at the trial of Petitioner, Brief of Petitioner, A 13-17, contradicts Petitioner's contention that the charge improperly shifted the burden of proof to the Defendant.

As Petitioner correctly states, a legal presumption may not be applied in such a way as to place the burden

on the Defendant to disprove the presumed or inferred fact by superior evidence. Sandstrom v. Montana, 442 U.S. 510 61 L.Ed.2d 39, 99 S.Ct. 2450 (1979). Petitioner misconstrues the Sandstrom rule, however, as eliminating entirely the right of the jury to rely upon presumptions or inferences, even in the absence of any evidence tending to refute the presumed or inferred fact. The latter is not the rule set down by the court in Sandstrom, which held only that a presumption which might have been construed by the jury to be conclusive was impermissible. In considering as a whole the charge in the instant case, it is clear that the presumption stated is not a conclusive presumption

like that found impermissible under Sandstrom.

The question then becomes whether a reasonable juror could interpret the charge as shifting the burden of persuasion to the Defendant. At most, the charge in the instant case creates a permissive presumption of the type considered in Ulster County Court v. Allen, supra. This type of presumption allows, but does not require, the trier of fact to infer an elemental fact from proof of a basic fact without placing any burden on the Defendant. Having established previously that the inference challenged here fulfills the rational connection test of Leary v. United States, supra, Respondent submits that the charge did not impermissibly shift

the burden of proof or persuasion to the Petitioner when considered in light of the charge as a whole. Cupp v. Naughten, 414 U.S. 141, 146-147, 38 LE2d 368, 94 S.Ct. 396 (1973).

Even if this Court were to consider that the charge to the jury concerning the statutory presumptions did, in fact, impermissibly shift the burden to Petitioner, Respondent submits that the charge should be determined to be harmless beyond a reasonable doubt under the principles of Chapman v. California, 386 U.S. 18 17 L.Ed.2d 705, 87 S.Ct. 824 (1967). In the instant case, the jury was instructed that the statutory presumption disappeared entirely upon the Defendant's presentation of any evidence tending to disprove the

presumed fact. Brief of Petitioner, A-16. Moreover, Defendant did present such evidence in the form of testimony by both his wife and the arresting officer. Thus, the statutory presumption having "disappeared" in accordance with the judge's instructions, there could have been no prejudice to Petitioner's cause even if the instruction had been improper.

It is well settled law that a jury charge challenged on grounds of burden shifting must be considered in its entirety in order that the reviewing court may properly determine whether the jury reasonably could have understood the burden of proof to have shifted to the Defendant. Cupp v. Naughten, supra, Sandstrom v. Montana, supra. Such a consideration of the

charge of the court below confirms the conclusion of the Georgia Court of Appeals that the burden of proof remained at all times on the State to prove the Defendant's guilt and that the court's charge to the jury comported with the standards set down by this Court.

In conclusion, Respondent submits that the Petitioner has raised no new issue of law for consideration by this Court and submits further that the language of O.C.G.A. § 40-6-392 and the charge to the jury based upon this language fulfilled the Petitioner's constitutional right to due process as defined by prior decisions of this Court. Accordingly, there is no merit to the issues raised in the petition.

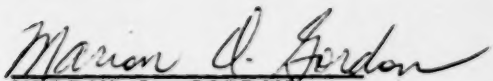
CONCLUSION

For the above and foregoing reasons, Respondent respectfully requests this Court to deny the Petition for a writ of certiorari filed on behalf of the Petitioner, William R. McCann.

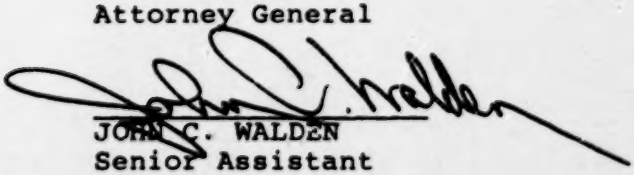
Respectfully submitted

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CERTIFICATE OF SERVICE

I, DARYL A. ROBINSON, a member of the bar of the Supreme Court of the United States and counsel of record for the Respondent, hereby certify that in accordance with the rules of the Supreme Court of the United States, I have this day served a true and correct copy of this Brief in Opposition for the Respondent upon the Petitioner by depositing three copies of same in the United States mail with proper address and adequate postage thereto to:

Howard Tate Scott
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Athens, Georgia 30601

This 2nd day of December, 1983.

/s/ DARYL A. ROBINSON